

*CL***NOT FOR PUBLICATION****UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK VICINAGE**

CHRISTOPHER HALL,	:	
Petitioner,	:	Civil Action No. 14-0069(SRC)
v.	:	OPINION
STEPHEN D'ILIO, ET AL.,	:	
Respondents.	:	

CHESLER, District Judge

This matter is presently before the Court pursuant to the submission of a Petition for a Writ of Habeas Corpus under Title 28 U.S.C. § 2254 [ECF No. 6], by the Petitioner Christopher Hall ("Petitioner"). For the reasons stated below, the Petition will be denied.

I. Procedural History

Petitioner is presently confined at New Jersey State Prison, in Trenton, New Jersey. (Pet. at 1.) He is imprisoned after conviction by a jury in the Superior Court of New Jersey, Passaic County, on February 15, 2005 for: first-degree robbery, N.J.S.A. 2C:15-1 and 2C:2-6 (count two); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-

4(a) (count three); and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count four). State v. Hall, Indictment No. 03-07-0677, 2008 WL 1820023 (N.J. Super. Ct. App. Div. Apr. 24, 2008) (per curiam).

On February 4, 2005, the sentencing court merged Petitioner's conviction for unlawful possession of a weapon for an unlawful purpose with his robbery conviction, granted the State's motion for an extended term of incarceration pursuant to N.J.S.A. 2C:43-6C, and sentenced Petitioner to 55 years imprisonment with an 85% parole ineligibility qualifier. (Answer to Petition for Writ of Habeas Corpus ("Answer") ECF No. 12 at 7, and Attachment Da7.) The sentencing court also imposed a consecutive five-year sentence with a 2½ year parole ineligibility on Count 4, unlawful possession of a weapon. (Id.)

Petitioner appealed, and the Appellate Division affirmed the convictions but remanded for resentencing, and reversed the consecutive nature of the sentence on Count 4. (Answer at 8); Hall, 2008 WL 1820023, at *1. The New Jersey Supreme Court denied certification on July 3, 2008. (Answer at 8, and Attachment Da44.)

Petitioner filed a petition for post-conviction relief on September 23, 2008. (Pet. at 18.) The PCR Court conducted a hearing and denied the petition on November 5, 2010. (Id. ¶11(a)(8); Answer at 9.) The Appellate Division affirmed on May

14, 2013. State v. Hall, 2013 WL 1953655 (N.J. Super. Ct. App. Div. May 14, 2013) (per curiam). The New Jersey Supreme Court denied certification on November 8, 2013. (Answer at 9.)

Petitioner initiated his habeas proceeding on January 6, 2014. (ECF No. 1.) Petitioner alleged the following Grounds for Relief:

GROUND ONE: The Trial Court Failed to Adequately Instruct the Jury Regarding Accomplice Liability and the Need to Determine the Defendant's Criminal Culpability with Respect to Different Degrees of Robbery.

GROUND TWO: The Trial Court Erred in Failing to Substitute an Alternate Juror During Deliberations, Instead Permitting a Juror to Continue Deliberations Despite Indications He Was Unable to Effectively Continue to Do So Due to His Medical Condition.

GROUND THREE: The Defendant Was Denied His Right to a Fair Trial As the Result of Inadmissible Hearsay Which Significantly Prejudiced the Defense by Characterizing the Defendant as Having Formulated the Plan to Rob the Victim.

GROUND FOUR: Defendant's Convictions Must Be Reversed Because He Was Denied Effective Assistance of Counsel, in that Trial Counsel Misadvised Defendant as to the State's Plea Offer and/or Failed to Adequately Communicate the Plea Offer to Defendant.

(Pet. ¶12, ECF No. 6.)

II. Response to the Petition

Respondent asserted the following in its answer to the petition: (1) the trial court properly instructed the jury on

accomplice liability and the need to determine Defendant's culpability regarding different degrees of the robbery offense; (2) the trial court's decision to permit a juror to continue deliberating was reasonable, given he unequivocally indicated that he was willing to continue, and all defense counsel allowed the juror to continue; (3) Petitioner has not demonstrated that the trial court's evidentiary ruling resulted in error, much less error of constitutional magnitude; and (4) Petitioner's habeas claim for ineffective assistance of trial counsel lacks merit, as the state courts made reasonable findings of facts and applied the appropriate legal standards in denying post-conviction relief. (Answer at 3.)

III. Analysis

A. Standard of Review

28 U.S.C. § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence

presented in the State court proceeding.

"Contrary to clearly established Federal law" means the state court applied a rule that contradicted the governing law set forth in Supreme Court precedent or that the state court confronted a set of facts that were materially indistinguishable from Supreme Court precedent and arrived at a different result than the Supreme Court. Eley v. Erickson, 712 F.3d 837, 846 (3d Cir. 2013) (citing Williams v. Taylor, 529 U.S. 362, 405 (2000)). An "unreasonable application" of clearly established federal law is an "objectively unreasonable" application of law, not merely an erroneous application. Id. (quoting Renico v. Lett, 130 S.Ct. 1855, 1862 (2010)).

On habeas review, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "The test for § 2254(d)(2)'s "unreasonable determination of facts" clause is whether the petitioner has demonstrated by "clear and convincing evidence," § 2254(e)(1), that the state court's determination of the facts was unreasonable in light of the record" at the time of the state court's adjudication. Rountree v. Balicki, 640 F.3d 530, 537-38 (3d Cir. 2011) (citations omitted).

B. State Court Factual Findings

The facts, as stated by New Jersey Superior Court Appellate Division on direct appeal are as follows.

According to the State's proofs at trial, Michael Messina, an admitted drug dealer previously convicted of robbery and drug possession, while driving in Paterson on March 15, 2003 at around 3:00 a.m., observed two women, Dawn Smith and Ebony Morris, standing on the sidewalk near Auburn Street. He thought Dawn was a woman he knew as "Stay High," who was actually Dawn's sister. When he got closer, however, he realized he was mistaken but nevertheless stopped to talk to the women, hoping to have sexual relations. Ebony declined because she had a boyfriend, but Dawn indicated an interest even though she had a boyfriend, who happened to be defendant, the father of her child. Messina offered them a ride to the store where they were headed, and then to their home, and they accepted.

On the way home, Messina received a call from a customer who wanted to purchase marijuana. Messina took a quick detour to meet him, removed some drugs from his console and sold his customer the marijuana from his car, witnessed by both Ebony and Dawn. After completing the transaction, Messina drove the women home but first obtained Dawn's phone number and made plans to get together the next day.

As Dawn entered her apartment with Ebony, she met Rodney, Ellis, defendant, her sister "Stay High", and another female, who were all inside. According to Dawn, when Rodney overheard her discussing Messina's money and large drug stash, he devised a plan whereby Dawn would go to Messina's house and keep him occupied while taking a shower, at which time Ebony would open the door for Rodney and Ellis. As Rodney explained his plan,

defendant resisted and even left the apartment, while Ellis sat quietly and nodded his head.

The next morning, Messina returned Dawn's numerous calls and arranged to meet her later at her house. As Messina arrived around 1:30 p.m. and waited for Dawn to come out, he noticed three black men staring at him as they walked past his vehicle. After they entered Dawn's building, Dawn and Ebony appeared. Messina was surprised to see Ebony, but Dawn assured him Ebony would just sit in the living room watching television and smoking marijuana.

When they arrived at Messina's home, which was about two miles from where Dawn lived, he brought the drugs from his car inside, locked the door behind him and immediately went upstairs to put the drugs in a dresser drawer in his bedroom. When he came back downstairs, Dawn asked to use the telephone and, unbeknownst to Messina, called Ellis to give him Messina's address. In the meantime, Messina gave Ebony a bag of marijuana. When Dawn finished her telephone conversation, she and Messina took a shower together in the first floor bathroom. While they were in the shower, Ebony knocked on the door and told Messina that his cell phone was ringing. Messina answered the call, which was from a preferred customer wishing to purchase marijuana. Messina agreed. He and Dawn exited the shower, got dressed, and all three left together.

Once outside, Messina noticed the same three men walking down his street whom he had seen earlier in front of Dawn's building. When he asked Dawn if she knew them, she responded no. Thinking it merely coincidental, Messina proceeded with the two women to the customer's house where he exited his car with five bags of marijuana, and completed the transaction. The trio returned to his house.

Upon arrival, Messina followed the same routine of bringing all of his drugs into his house, locking the door behind him, and hiding the drugs in his bedroom. Messina and Dawn again entered the shower and were again interrupted by Ebony who this time told them she was going outside to smoke a cigarette. Almost immediately thereafter, Ellis "ripped the shower curtain down" holding a firearm. Messina recognized the man to be one of the three men he first saw in front of Dawn's building, and then again in front of his house. Dawn immediately got out of the shower, grabbed her clothes, and left the bathroom without any resistance from Ellis. Ellis then demanded Messina's money and drugs, but Messina said that he did not have either. Ellis persisted, however, and ordered Messina out of the shower.

Messina was forced to lie down naked on his living room floor where he noticed a second man, defendant, wearing what he believed to be a bandana over his face. Based on the man's build and facial features not covered by the mask, Messina believed defendant was also one of the men he had seen previously. Defendant restrained Messina with a cord from his vacuum cleaner and Messina's belt, and assured him that once Messina gave them the drugs and money, they would leave.

In an attempt to isolate defendant, who appeared to be unarmed, Messina told the men that the drugs were outside in the car. Once alone, it was Messina's plan to restrain defendant. However, it was defendant who checked the vehicle, leaving Ellis, who was armed, behind. At this point, Dawn entered the kitchen, and signaled to Ellis that the drugs were upstairs. Ellis then returned to Messina, placed the gun against his head, and angrily told him to stop playing around because he knew the drugs were upstairs.

Messina finally told Ellis exactly where the drugs were located because, at that point, "it was getting serious[,"] and he was also worried that his mother would arrive home. Together, defendant and Dawn went to Messina's bedroom, while Ellis remained with Messina holding the gun to his head. Shortly thereafter, defendant descended the stairs holding the drugs.

At this point, the doorbell rang and the door began to open. Ellis turned and fired the gun without warning, shooting Ebony as she was reentering the house. Ellis and defendant ran out the front door, while Dawn stayed behind. Messina untied himself, wrapped a coat around his waist, ran outside, and saw Ellis sprinting away, with Rodney, the third man he had seen earlier in the day, lightly jogging down the block.

When Messina went back into the house, he found Ebony lying on the ground motionless with the gun next to her. Dawn was yelling frantically for Messina to help Ebony. Messina went upstairs to get dressed. When he returned, the gun had disappeared. Dawn had thrown it out the bathroom window for fear Ellis would return and kill her to cover up his crime. Messina called 9-1-1.

Ebony died of a bullet wound to the face. When police arrived, they questioned Dawn and Messina separately. At first, Dawn portrayed herself as a victim, explaining that she was in the shower with Messina when two black males entered the home, forced them out of the shower, robbed them, and shot Ebony in the process. Messina then also informed the officers that the firearm had disappeared from the living room floor when he went upstairs to get dressed. Later, Detective Rafael Fermin, while walking around the perimeter of the house, discovered the firearm lying right outside the bathroom.

At the police station, Dawn admitted her role in the robbery. She and Messina identified defendant and the two co-defendants through photographs, and both gave formal statements.

During the course of the ongoing investigation, the police received information that on May 2, defendant would be traveling by bus to the Port Authority in New York under the name Tesfiete Planno. After police confirmed this information with Greyhound, they proceeded to the bus terminal where they observed defendant exit the bus, looking basically the same, with the exception of highlighted hair. At first, defendant denied that he was Christopher Hall. However, when the police showed defendant a wanted poster with his picture, he replied "you got me." Defendant was read his Miranda rights, and placed under arrest. During the subsequent interview, defendant denied any involvement in the robbery explaining that he, Dawn and Messina were just hanging out at Messina's house when Ebony decided to go to the liquor store. When she returned, defendant heard a shot fired and saw Ebony lying on the floor. Scared, defendant ran to his mother's house.

Evidently crediting the State's version, the jury found defendant guilty of armed robbery and the related weapons offenses.

State v. Hall, 2008 WL 1820023, at *1-3.

The Appellate Division then made the following factual findings in affirming the PCR Court's denial of Petitioner's petition for post-conviction relief.

As of 2004, defendant faced charges in five pending indictments. On January 26, 2004, the trial judge conducted a pre-trial conference on the record, in defendant's presence, regarding one of the indictments

(02-04-414). At this proceeding, the assistant prosecutor verified that the State's global offer to resolve all five indictments was a sentence recommendation of twenty years in prison, subject the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Two lawyers appeared for defendant at the hearing. The first attorney appeared on 02-414-04. The second attorney was present because he represented defendant on the other indictments. The judge allowed both attorneys to meet with defendant to discuss the proposed resolution of all charges. Defendant rejected the plea offer, proceeded to trial on 02-414-04, and was found guilty of several of the charges.

In indictment 03-07-677, the State charged defendant with first-degree robbery, N.J.S.A. 2C:15-1 and N.J.S.A. 2C:2-6; second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a; and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b. In October 2004, defendant proceeded to trial and a jury found defendant guilty of these charges.

In 03-07-677, the judge imposed an aggregate extended sentence of sixty years in prison with forty-nine and a quarter years without parole, concurrent to his sentence on the other indictments. We affirmed the convictions, but remanded for re-sentencing in accordance with State v. Thomas, 188 N.J. 137 (2006), and State v. Natale, 184 N.J. 458 (2005). State v. Hall, No. A-2652-05 (App.Div. Apr. 24, 2008). The Supreme Court denied certification. State v. Hall, 207 N.J. 35 (2011).

Defendant filed a pro se petition for PCR and his designated counsel thereafter filed an amended petition and brief. Defendant argued that his trial counsel failed to accurately advise him about the global offer. Defendant asserted that had he known

about the plea offer, he would have accepted it.

In November 2010, Judge Joseph A. Falcone conducted an evidentiary hearing. The judge listened to testimony from defendant and his two lawyers. Both lawyers testified that an assistant prosecutor made the global offer, they discussed the offer with defendant, and defendant rejected it. Defendant testified that his attorneys indicated the global offer was a sentencing recommendation of twenty-five years in prison, not twenty years. Judge Falcone then stated that

The critical issue is ... whether or not [defendant] made an informed decision to proceed to trial. In that regard[,] I've heard this morning the testimony of three witnesses: [the first attorney] on one of his five indictments; [the second attorney] on the other four indictments, two of which went to trial—on one of them he was acquitted; on one [03-677-07] he was convicted ... and he pled guilty as to another. [The second attorney] cannot remember the outcome of the remaining indictment.

....

There's disparity in the recollections of the two lawyers on the one hand versus [defendant] on the other. The [January 26, 2004] transcript doesn't appear to bear out [defendant's] statement that the plea offer was [twenty-five years]. It's clear [that] ... the offer [was twenty years].

[Defendant] understood [that] when he went into the jury room on January 26, 2004, it was to discuss all five cases, that the offer made was to cover all five cases.

....

[Defendant] says ... [that] the offer was [twenty-five]. That's not born[e] out by the official record. That's not born[e] out by the testimony [from both attorneys]. So [defendant] is mistaken in that regard.

....

[The assistant prosecutor elicited from defendant] that [defendant] never wanted to plead guilty [in indictment 03-07-677] ... [because] he wanted his day in court.

....

On the issue of credibility, it's a nobrainer. Neither lawyer came in and was remembering word-for-word what went on; but both did what they're required to do as an officer of the court, and that's let the client know what the offer is, the strengths and weaknesses of the case.

....

I accept as truthful the testimony provided by both [lawyers]. The transcript ... supports what they said; the plea offer was [twenty to do eighty-five percent] to cover everything.... I'm satisfied that both counsel conveyed to [defendant] their views as to the worth of that plea offer vis-à-vis the proofs in the various cases, including [the] two separate robbery trials.

The judge then denied the PCR petition and defendant's subsequent motion for reconsideration.

State v. Hall, 2013 WL 1953655, at *1-2 (footnotes omitted).

C. Ground One

In Ground One of the habeas petition, Petitioner alleged: "the trial court failed to adequately instruct the jury

regarding accomplice liability and the need to determine the Defendant's criminal culpability with respect to different degrees of robbery." (Pet. at 7-8.) Petitioner contended the trial court's failure necessarily tainted the jury's verdict. (Id. at 8.)

Respondent asserted Petitioner has not demonstrated that the state appellate court decision was unreasonable. (Answer at 21.) On direct appeal, Petitioner claimed that the trial court did not adequately instruct that an accomplice may be guilty of a lesser offense than a principal. (Id. at 23.)

The New Jersey Superior Court Appellate Division held:

The State's case against defendant was founded on a theory of accomplice liability. "When a prosecution is based on the theory that a defendant acted as an accomplice, the trial court is required to provide the jury with understandable instructions regarding accomplice liability." State v. Savage, 172 N.J. 374, 388 (2002). The Savage Court explained,

By definition an accomplice must be a person who acts with the purpose of promoting or facilitating the commission of the substantive offense for which he is charged as an accomplice. Therefore, a jury must be instructed that to find a defendant guilty of a crime under a theory of accomplice liability, it must find that he shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act.

[Ibid. (internal citations and quotes and citations omitted).]

Defendant does not challenge the court's definition of accomplice liability. Instead, as noted, he argues the court did not adequately instruct that an accomplice may be guilty of a lesser offense than that of the principal. Such a claim, however, may not be viewed in isolation, but must be considered against the whole of the jury charge to determine its overall effect.

State v. Wilbely, 63 N.J. 420, 422 (1973).

Here, the judge expressly informed that the culpability of an accomplice depends on his individual state of mind:

As I explained earlier ... our law recognizes that two or more persons may participate in the commission of an offense but each may participate therein with a different state of mind. The liability or responsibility of each participant for any ensuing offense is dependent upon his own state of mind and not anyone else's.

The judge reiterated this concept of the differing degrees of culpability based on differing mental states when he referenced a hypothetical he gave earlier in his instructions concerning a handyman working in someone's home who gives a third party directions on how to break in undetected:

Earlier I illustrated the concept of legal accountability for the conduct of another by reason of the hypotheticals I gave you about the handyman and the various ways that culpability can be different

between different people connected in the same venture.

In considering whether a defendant is guilty or not guilty as an accomplice to the crime of robbery or robbery while armed or theft from the person, in the case of Kenton Rodney, remember that each person who participates in the commission of an offense may do so with a different state of mind and the liability or responsibility of each person is dependent upon his own state of mind and no one else's.

The hypothetical to which he was referring is set out in full:

And the reason I'm telling you about this is because I want to give you a hypothetical situation to explain the proposition that in the law people, even though they're involved in the same venture, can have different degrees of culpability or responsibility.

An here[']s what I mean by that, let's suppose the handyman said, look, in order ... for you to do this there is always this uncle in the house. You're going to need to take a gun just to keep him quiet or in case he shows up or comes from upstairs, downstairs. You better take a gun just in case. Now, his purpose is to promote or facilitate a burglary done while armed, so he would be guilty of that second degree of burglary. A higher degree of burglary because his purpose was to promote or facilitate that.

Let's suppose, on the other hand, he never had a thought about a gun, didn't say anything to his associate who's going to go in the house but that person decided, look, I think just for my own purposes I'm going to take a gun with me. Okay. Now the handyman, his purpose is to promote or facilitate a simple burglary. He would be guilty of that if it was proven by the evidence beyond a reasonable doubt; the man who went in the home would be guilty of a higher crime, a higher degree of burglary, because he did the burglary while being armed.

So, you can see in that hypothetical there are different degrees of responsibility even though the two people are involved in the same venture.

Let's suppose the handyman never had any thoughts of a burglary. He never had a purpose to promote or facilitate a burglary but he told his friend about the jewelry in the house and how this door, they don't lock the back door, but he did not have a purpose to promote or facilitate any crime. He wouldn't be guilty of anything even though his information is what was used by his associate who then went in and did the burglary in whatever form and stole property from in the house.

So, when you're dealing with accomplice liability you have to examine each individual person involved in the venture separately and their guilt is dependent on their state of mind and what their purpose was. So you have to

deliberate the involvement and the state of mind and the purpose of each person involved separately, if you first find that they are involved together.

We are satisfied that the court's jury charge, considered in its entirety, clearly instructed that participants in a criminal venture can have different degrees of culpability based on their own individual state of mind.

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State v. Hall, 2008 WL 1820023, at *4-7.

The test announced by the Supreme Court in Estelle v. McGuire, 502 U.S. 62, 72 (1991) governs constitutional claims that an erroneous jury instruction "by itself so infected the entire trial that the resulting conviction violates due process." The jury instruction must be viewed in the context of the instructions as a whole and the trial record. Id. It is not enough if the jury instruction was improper under state law; there must be a reasonable likelihood that the jury applied the instructions in such a manner as to violate the Constitution.

Id.

Petitioner has offered no explanation of how the jury instruction so infected the entire trial as to violate due process, let alone how the state court's decision involved an unreasonable application of the Estelle test. Here, the state appellate court reasonably found that the hypothetical used by

the trial court provided a clear illustration of the law concerning intent and lesser offenses in accomplice liability. Thus, there was no constitutional error in the jury instruction, and Ground One will be denied.

D. Ground Two

Petitioner claimed, in Ground Two of the habeas petition, that the trial court erred by permitting a juror to continue deliberations despite his medical condition. (Pet. ¶12, Ground Two.) Petitioner alleged the court erred because the juror had been hospitalized for a heart problem, and he was allowed to continue deliberating instead of being replaced by an alternate. (Id.) Respondent asserted that Petitioner failed to articulate why the court's decision not to remove the juror was erroneous or how such error violated the Constitution. (Answer at 30.)

This Court construes Petitioner's claim as alleging the juror's medical condition prevented him from effectively serving as a juror. The state appellate court rejected this claim for two reasons: (1) defense counsel agreed to permit the juror to continue; and (2) the trial judge did not abuse his discretion in light of the juror's unequivocal representations that he was willing to continue deliberating despite his chest pain. State v. Hall, 2008 WL 1820023 at *7-9.

Petitioner has pointed to nothing in the record to support a finding that the juror's condition was so severe that he could

not function in his role as a juror. Petitioner has not rebutted the presumption of correctness of the state appellate court's finding that the juror in question unequivocally represented that he was willing to continue deliberating despite his medical concerns. Furthermore, Petitioner has not identified controlling Supreme Court precedent, let alone how the state appellate court's decision involved an unreasonable application of Supreme Court precedent. The Court finds no merit to Ground Two.

E. Ground Three

In Ground Three of the habeas petition, Petitioner alleged he was denied his right to a fair trial because hearsay evidence significantly prejudiced the defense by suggesting Defendant formulated the plan to rob the victim. (Pet. ¶12, Ground Three.) Petitioner further contended the limiting instruction was insufficient. (Id.)

Respondent noted that the habeas petition did not even identify the alleged hearsay or who gave the testimony. (Answer at 31.) On direct appeal, Petitioner argued Witness Messina testified to Dawn Smith's out-of-court statement that Petitioner planned the robbery. (Id.)

Petitioner failed to set forth his claim in sufficient detail meet the habeas standard for relief. Even if Petitioner had identified the hearsay testimony that he challenged, and if he had identified the controlling Supreme Court precedent, his

claim would fail. "A federal habeas court is limited to deciding whether the admission of the evidence rose to the level of a due process violation." Keller v. Larkins, 251 F.3d 408, 416 n. 2 (3d Cir. 2001).

As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.

Lisenba v. People of the State of California, 314 U.S. 219, 236 (1941).

The test on habeas review is whether the state appellate court unreasonably applied this holding in rejecting Petitioner's claim that admission of the hearsay evidence, even with the trial court's limiting instruction, violated due process. The Appellate Division ruled:

During cross-examination, Messina was asked whether he had spoken with Dawn after Ebony was killed. Messina responded that two or three months later, he spoke to Dawn over the telephone, and she attempted to convince him that she did not try to rob him, that she was innocent. She told him that "it was her baby's father that was behind it all." R. 2:10-2.

. . .

First, and most importantly, the trial judge gave a curative instruction *immediately* after the hearsay statement was elicited.

The instruction emphatically indicated that the jury was not to consider the statement as evidence against defendant. . . .

Second, the evidence against defendant was substantial . . . There was the testimony of Dawn, his girlfriend and mother of his child, indicating that defendant directly participated in the robbery. Similar testimony was proffered from Messina. Moreover, when defendant was confronted at the police station by the police, he initially denied his true identity and, indeed, was traveling under an alias, leading to an inference of guilt.

Finally, Dawn herself, the declarant, testified at trial . . . She was subjected to full cross-examination and the jury had an opportunity to evaluate her credibility as well as Messina's. In fact, on the critical issue of who planned the robbery, Dawn repeatedly testified at trial that it was Rodney, not defendant, who devised the plan. We recognize, of course, the fact that Dawn testified does not render admissible what might otherwise be inadmissible hearsay-not being subject to cross-examination at the time of the challenged statement. However, we conclude that since the jury had the opportunity to hear, weigh, and evaluate the testimony of Dawn as well as Messina regarding the making of the statement, the error, if any, was not clearly capable of producing an unjust result . . .

State v. Hall, 2008 WL 1820023, at *9-*11 (internal citations omitted).

The state appellate court gave legitimate reasons why the effect of the hearsay evidence on the trial was not fundamentally unfair, including the forceful limiting

instruction given by the judge, and by the declarant's trial testimony that it was someone other than defendant who planned the robbery. There was nothing unreasonable about the state appellate court's application of controlling Supreme Court precedent. Therefore, Ground Three will be denied.

F. Ground Four

Petitioner's final claim for relief is that he was denied effective assistance of counsel because counsel incorrectly or inadequately communicated a plea offer to him. In support of this claim, Petitioner asserted he was not advised of the global plea offer until January 26, 2004, when Judge Rothstadt outlined the global plea offer and described the potential consequences of rejecting the offer. (Pet., ¶12, Ground Four(a)). Respondent asserted that Petitioner's bare arguments, unsupported by factual allegations, fell short of establishing a reviewable habeas claim. (Answer at 34.)

On habeas review, the court must look to the state court's decision. The Appellate Division stated:

As of 2004, defendant faced charges in five pending indictments. On January 26, 2004, the trial judge conducted a pretrial conference on the record, in defendant's presence, regarding one of the indictments (02-04-414). At this proceeding, the assistant prosecutor verified that the State's global offer to resolve all five indictments was a sentence recommendation of twenty years in prison, subject the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Two

lawyers appeared for defendant at the hearing. The first attorney was present because he represented defendant on the other indictments. The judge allowed both attorneys to meet with defendant to discuss the proposed resolution of all charges. Defendant rejected the plea offer, proceeded to trial on 02-414-04, and was found guilty of several of the charges.

In indictment 03-07-677, the State charged defendant with first-degree robbery, N.J.S.A. 2C:15-1 and N.J.S.A. 2C:39-4a; and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b. In October 2004, Defendant proceeded to trial and a jury found defendant guilty of these charges. . .

State v. Hall, 2013 WL 1953655, at *1-2 (internal footnotes omitted). Given these factual findings, the Appellate Division held that Petitioner had not satisfied either prong of the test for ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Id. at *2.

Here, Petitioner claims his trial counsel did not tell him of the global plea offer before the January 26, 2004 pretrial conference. While this contention is consistent with the facts found by the Appellate Division on PCR review, Petitioner has not established how he was prejudiced by not being told of the global plea offer sooner.

The Appellate Division found that the trial judge allowed two defense attorneys to meet with Petitioner during the January 26, 2004 pretrial conference to discuss the global plea offer. Nonetheless, Petitioner rejected the offer and went to trial.

These facts do not suggest counsel was ineffective. Even if counsel should have advised Petitioner of the global plea offer sooner, there was no prejudice because Petitioner could have accepted the plea offer at the pretrial conference. The Court will deny Ground Four.

IV. Conclusion

For the reasons discussed above, the Court will dismiss the habeas petition with prejudice.

V. Certificate of Appealability

This Court must determine whether Petitioner is entitled to a certificate of appealability in this matter. See Third Circuit Local Appellate Rule 22.2. The Court will issue a certificate of appealability if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The discussion of Petitioner's claims above demonstrates that Petitioner has not made such a showing, and this Court will not issue a certification of appealability.

DATED: _____

6/17/15



STANLEY R. CHESLER
United States District Judge